NO. 57944-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

Taft Lawson,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael S. Spearman, Judge

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# APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Taft Lawson challenges his conviction and sentence for second-degree assault. First, the State failed to disprove beyond a reasonable doubt that Mr. Lawson acted in self-defense when he hit his ex-wife once in response to her slapping him. Second, Mr. Lawson was denied the effective assistance of counsel when his attorney failed to move to suppress evidence that is inadmissible under the Washington Privacy Act and failed to request that the jury be instructed there is no duty to retreat in response to an assault. Finally, even if Mr. Lawson's conviction is affirmed, his case must be remanded for resentencing because three points were erroneously added to his offender score.

## B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Lawson did not act in lawful self-defense.

2. Defense counsel's deficient performance deprived Mr. Lawson of his right to effective assistance of counsel.

3. The sentencing court erred in failing to correct the State's clerical error which resulted in an extra point in Mr. Lawson's Sentencing Reform Act ("SRA") offender score.

4. The sentencing court erred by including an out-of-state conviction in Mr. Lawson's criminal history that would have washed out if it were a Class C felony, where the State failed to present any evidence that it was a Class B felony.

5. The sentencing court erred by including an out-of-state conviction in Mr. Lawson's criminal history where the State failed to present any evidence that the crime was comparable to a felony in Washington.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order to find a person guilty of the crime of second-degree assault, the State must prove each element of the crime beyond a reasonable doubt. If the defendant raises a self-defense claim, the State bears the burden of proving beyond a reasonable doubt the defendant did not act in self-defense. Here, Ms. DeCaro admitted that she hit Mr. Lawson first and he hit her once in response. Did the State fail to present sufficient evidence to prove Mr. Lawson did not act in self-defense? (Assignment of Error 1).

2. An accused person has the right to effective assistance of counsel, including counsel who objects to inadmissible and prejudicial evidence, and requests jury instructions essential to supporting the defendant's theory of the case. Here, Mr. Lawson's

attorney failed to move to suppress recordings made in violation of the Washington Privacy Act and failed to request that the jury be instructed there is no duty to retreat in response to assault. Is it reasonably probable that counsel's deficient performance prejudiced the outcome of the case and resulted in ineffective assistance of counsel? (Assignment of Error 2).

3. Prior felonies but not misdemeanors count toward a defendant's SRA offender score. Where the sentencing court properly deleted a misdemeanor from the list of felonies in Mr. Lawson's criminal history, but forgot to reduce the offender score accordingly, did the court commit a clerical error that should be corrected? (Assignment of Error 3).

4. Because Class C felonies "wash out" after five crime-free years, the State was required to prove that Mr. Lawson's 1974 and 1975 convictions in Pennsylvania were Class B felonies in order to count them in Mr. Lawson's offender score. Where the State failed to present any evidence that the 1974 and 1975 convictions were equivalent to Class B felonies in Washington, did the sentencing court err in including them in Mr. Lawson's offender score? (Assignment of Error 4).

5. For the sentencing court to rely upon an out-of-state conviction in calculating a defendant's offender score, the State must prove the offense was comparable to a Washington felony. Here, the State did not present any evidence that Mr. Lawson's Pennsylvania conviction for receiving stolen property was based on proof he knew the property he received was stolen, nor did the State present any evidence that he committed conduct that would have constituted a Class B felony rather than a Class C felony that would have washed out, or a misdemeanor that would not have counted at all. Did the sentencing court err in including a point for this out-of-state conviction in Mr. Lawson's offender score? (Assignment of Error 5).

D. STATEMENT OF THE CASE

Taft Lawson and D'Anna DeCaro met in 1986 and were married in 1987. 1/25/06 RP 6. The two divorced after nine years, but maintained an on-again, off-again relationship for another nine years. 1/25/06 RP 6, 8. Mr. Lawson lived at Ms. DeCaro's house with her when he was not working on a fishing boat in Alaska. 1/25/06 RP 10. Throughout their tumultuous relationship, both parties have been physically and verbally abusive. 1/25/06 RP 100, 104.

On the night of September 28, 2005, Ms. DeCaro picked Mr. Lawson up from the airport after he had flown home from Alaska. 11/25/06 RP 23. After arriving at home, the two began arguing about money. 11/25/06 RP 24. They then went out for a couple of drinks, and continued their argument at the bar. 11/25/06 RP 25-26. They left the bar at closing time, went home, and continued fighting. 11/25/06 RP 28.

After Mr. Lawson said something about Ms. DeCaro's children, Ms. DeCaro "was so sick of it, I turned around and slapped him across the face and told him to go to Hell." 11/25/06 RP 30. Mr. Lawson instantly reacted by punching Ms. DeCaro once. 11/25/06 RP 32, 73, 95, 99. He then left the house. 11/25/06 RP 32. Ms. DeCaro sustained facial fractures as a result of the punch. 1/24/06 RP 23-24.

Mr. Lawson was arrested, and he called Ms. DeCaro several times from the King County Jail. 11/25/06 RP 44. The jail recorded the calls. 1/24/06 RP 4.

The State charged Mr. Lawson with one count of assault in the second degree, one count of bribing a witness, and three counts of tampering with a witness. CP 9-11. Before trial, the prosecutor submitted a brief containing motions in limine but the

defense attorney did not. 1/24/06 RP 3. The defense attorney did not request a CrR 3.6 hearing. 1/24/06 RP 5. The defense attorney did not object to the introduction of the recorded conversations between Mr. Lawson and Ms. DeCaro. Id.

During trial, defense counsel argued that Mr. Lawson lacked the requisite mens rea for assault, because he instinctively hit back in self-defense. 1/24/06 RP 5; 1/25/06 RP 64, 95, 99; 1/26/06 RP 26-30, 33-35. However, defense counsel did not ask that the jury be instructed there is no duty to retreat in response to an assault. 1/25/06 RP 113-138.

Mr. Lawson was convicted of assault in the second degree. CP 57.

In its presentence report, the State alleged that Mr. Lawson's offender score was 21. Supp. CP 81. The State included in the felony list a "violation of work release" for which Mr. Lawson had served 30 days in jail. Supp. CP 82. The court deleted this item from the criminal history in the judgment and sentence. CP 63. However, the score remained 21. CP 58.

The list of felonies also included three crimes Mr. Lawson committed in Pennsylvania. CP 63; Supp. CP 83. The State did not present any evidence that they were comparable to Washington

felonies. Supp.CP 72-84; 2/22/06 RP 1-18. Nor did the State present any evidence that they were not Class C felonies that had washed out. Id.

At the sentencing hearing, the State recommended the high end of the standard range given an offender score of 21 and a seriousness level of four. 2/22/06 RP 2. The judge accepted the State's recommendation and imposed an 84-month sentence – the maximum possible under the standard range – based partly on the "very large number of prior felony convictions." 2/22/06 RP 13.

Mr. Lawson appeals. CP 66-71.

E. ARGUMENT

1. THE STATE FAILED TO DISPROVE SELF-DEFENSE BEYOND A REASONABLE DOUBT.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. 14;

Wash. Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Mr. Lawson was charged with one count of second degree assault, in violation of RCW § 9A.36.021(1)(a), for intentionally assaulting another and thereby recklessly inflicting substantial bodily harm. CP 9. RCW § 9A.36.021(1) provides:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm . . . .

Assault is an intentional act. State v. Robinson, 58 Wn. App. 599, 606, 794 P.2d 1293 (1990), rev. denied, 116 Wn.2d 1003 (1991).

A claim of self-defense negates the mental state of intent necessary to establish the crime of assault. State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). RCW § 9A.16.020 reads, in relevant part:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;

Reasonably necessary force – the degree of force that a reasonably prudent person would use under similar circumstances – is permissible in self-defense. State v. Fischer, 23 Wn. App. 756, 759, 598 P.2d 742 (1979). Persons acting in self-defense have no duty to retreat when assaulted in a place they have a right to be. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); State v. Williams, 81 Wn. App. 738, 742, 916 P.2d 445 (1996).

Once evidence of self-defense is presented, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 619; State v. Takacs, 35 Wn. App. 914, 919, 671 P.2d 263 (1983).

> By definition, an assault requires the use of unlawful force. Since the use of force in self-defense is lawful, self-defense negates an element of assault. Consequently, where there is any evidence of self-defense, the state bears the burden of proving that the defendant did not act in self-defense.

Seth A. Fine and Douglas J. Ende, 13A Washington Practice: Criminal Law § 307 at 47 (2nd ed. 1998).

b. The State produced insufficient evidence to disprove self-defense. In this case, Ms. DeCaro testified that she hit Mr. Lawson first while they were arguing:

> Question: How did the argument end?
> Ms. DeCaro: He – I was standing in the archway between the hall and the living room, and he was saying something about my kids again. And I was so sick of it, I turned around and I slapped him across the face and told him to go to Hell.

1/25/06 RP 30. Ms. DeCaro testified that Mr. Lawson immediately hit her back. 1/25/06 RP 73, 99. There was no period of time in between. Id. Ms. DeCaro acknowledged that her hitting Mr. Lawson was "the event that kicked everything off," and that Mr. Lawson hit her only once after she hit him once. 1/25/06 RP 95.

Mr. Lawson's instinctive reaction to being hit negates the intent element and prevents the State from disproving self-defense beyond a reasonable doubt. As to the reasonableness of Mr. Lawson's counterpunch, the only difference between Ms. DeCaro's hit and Mr. Lawson's return hit was that Ms. DeCaro used an open hand and Mr. Lawson's hand was closed. 1/25/06 RP 32. Ms. DeCaro's more severe injury resulted from the difference in size

between the two. 1/25/06 RP 73. Furthermore, although the cheekbone is thick, the bones of the eye socket are thin, brittle and "fairly easily fractured." 1/24/06 RP 36-37.

Mr. Lawson's case stands in contrast to State v. Watkins, 61 Wn. App. 552, 811 P.2d 953 (1991), which illustrates unreasonable use of force. There, the defendant became involved in an altercation between his friend, Hurt, and another man, Cejka. Id. at 554. Watkins entered the melee and threw a beer bottle at Cejka's head, causing a one-inch laceration. Id. As Cejka was lying in the street in a fetal position trying to cover his head and chest, Watkins repeatedly struck Cejka in the head with his fist. Engaging in harmless error analysis, the Watkins court stated:

> Here, no jury could conclude that in order to defend himself or another, a reasonable person would continue to repeatedly hit the alleged aggressor in the head after that person fell to the ground and assumed a fetal position. Instead, the jury must necessarily conclude that the use of force is unreasonable, and, therefore unlawful.

Id. at 561.

Mr. Lawson did not continue to repeatedly hit the first aggressor in this case; he hit her once. 1/25/06 RP 95. The first aggressor in this case was not lying in a fetal position; she had just hit Mr. Lawson across the face. 1/25/06 RP 73, 99. The State failed

to present sufficient evidence to prove intent and disprove self-defense.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Lawson committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the second degree assault conviction based upon the State's failure to disprove self-defense.

2. MR. LAWSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO MOVE TO SUPPRESS INADMISSIBLE EVIDENCE AND FAILED TO REQUEST AN ESSENTIAL JURY INSTRUCTION.

Even if the State disproved self-defense beyond a reasonable doubt, Mr. Lawson's conviction must be reversed and

his case remanded for a new trial because he did not receive effective assistance of counsel.

a. Mr. Lawson had a constitutional right to effective assistance of counsel at trial. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6;[1] Wash. Const. art. I, § 22.[2] "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities,

[1] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[2] Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

> not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

Cronic, 466 U.S. at 653-54 (internal citations omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must show, "First, [that] counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687.

As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms") (quoting Strickland, 466 U.S. at 688). While an attorney's decisions are treated with deference,

his or her actions must be reasonable under all the circumstances. Wiggins, 539 U.S.. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result of the trial would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78. The defendant must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. State v. Tilton, 149 Wn.2d 775, 784, 72 P.2d 735 (2003).

In this case, Mr. Lawson's attorney failed to move to suppress inadmissible evidence, and failed to request a "no duty to retreat" jury instruction supporting his self-defense theory. These omissions had no reasonable tactical or strategic basis, and they prejudiced Mr. Lawson. It is reasonably probable that had the evidence been excluded and the jury instruction been given, the outcome would have been different. Accordingly, Mr. Lawson was denied the effective assistance of counsel, and his conviction must be reversed.

b. The Washington Privacy Act prohibits the recording of private conversations absent the consent of both parties. Washington's Privacy Act, chapter 9.73 RCW, is "one of the most restrictive in the nation." State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). It proscribes the interception or recording of private communications, including those transmitted by telephone, "without first obtaining the consent of all the participants in the communication." RCW § 9.73.030(1)(a). Evidence obtained in violation of the act is inadmissible for any purpose at trial. RCW § 9.73.050.

c. Mr. Lawson's attorney's performance was deficient because he failed to move to suppress recordings of private conversations recorded without the consent of either party. Mr. Lawson's conversations with his wife were private communications and neither party consented to the recording of their content. Accordingly, the recordings should have been excluded at trial. Mr. Lawson's attorney's failure to move to suppress the recordings constituted constitutionally deficient performance.

The Privacy Act does not define the term "private," so Washington courts have adopted the dictionary definition: "belonging to one's self . . . secret . . . intended only for the persons

involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public." Christenson, 153 Wn.2d at 192-93 (quoting Webster's Third New International Dictionary (1969)). A communication is private (1) when parties manifest a subjective intention that it be private, and (2) where that expectation is reasonable. Christenson, 153 Wn.2d at 193. The primary focus of the inquiry is whether the parties intended the information conveyed in the disputed conversations to remain confidential. State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996). The secondary consideration of objective privacy is analyzed by reviewing the duration and subject matter of the conversations, the location and presence of third parties, and the relationship between the parties. State v. Clark, 129 Wn.2d 211, 225-26, 916 P.2d 384 (1996).

Here, Mr. Lawson clearly intended that his conversations with his ex-wife be private. The communication was not "an inconsequential, nonincriminating telephone conversation with a stranger." Faford, 128 Wn.2d at 484 (citing Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992)). It was a conversation of consequence regarding the couple's personal finances and combative relationship. It was an

incriminating conversation regarding the parties' hitting each other. And far from being a conversation with a stranger, the two parties had been together on and off for 20 years, been married for 10 years, and produced a child. Mr. Lawson's whispering throughout the conversations further evidences an intent that the conversations be private. Ex. 6, 7. The communications were thus intended to be private, regardless of the defendant's location in jail. See Faford, 128 Wn.2d at 485 (parties' conversation was intended to be private regardless of their using cordless telephones because it was a consequential, incriminating communication between girlfriend and boyfriend).

An analysis of the objective factors also leads to the conclusion that the conversations in question were private. Unlike the communications in Clark, the conversations here were long, and the subject matter was sensitive. See Clark, 129 Wn.2d at 225, 228 ("very abbreviated" conversations consisting of "routine" subject matter not private). Here, the relationship between the parties also cuts in favor of privacy, because Mr. Lawson and Ms. DeCaro were longtime partners and co-parents, unlike the strangers at issue in Clark, 129 Wn.2d at 227, and Kardoranian, 119 Wn.2d at 190. An analysis of the final factor – location and

presence of third parties – also reveals that the conversations were private. The parties here conversed over the telephone, not on a public street as in Clark, 129 Wn.2d at 228, or at a meeting as in State v. Slemmer, 48 Wn. App. 48, 53, 738 P.2d 281 (1987). In sum, an analysis of both subjective and objective factors indicates that the conversations admitted into evidence in this case were "private communications" subject to the prohibitions of RCW § 9.73.030(1)(a).

Furthermore, neither party consented to the recording of the communication, and both parties must consent in order for the recording to be lawful. Id. Consent is considered obtained "whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted." RCW § 9.73.030(3). Here, although jail officials warned the parties, through a recording, that their conversations would be recorded, neither party announced the same to the other party. In such circumstances, notice does not satisfy the consent requirement. A contrary conclusion would create an insurmountable bootstrapping problem – a person or

governmental entity could render their illegal conduct legal merely by preannouncing it.

Nor does the doctrine of implied consent apply here. See State v. Townsend, 147 Wn.2d 666, 675-78, 57 P.3d 255 (2002) (a party implies consent when he knows that his messages will be recorded on the computer or answering machine of the other party). Here, Mr. Lawson was not leaving a message for his ex-wife or sending her e-mail; he was speaking to her directly. His ex-wife was not recording him; the county was. And though the county notified the callers that their conversation would be recorded, the parties had no choice in the matter, unlike the defendant in Townsend, who could have advised the other party to override his default software settings or chosen a different method of communication altogether.

In sum, the conversations between Mr. Lawson and Ms. DeCaro were private, and neither, let alone both, consented to their being recorded. Accordingly, the conversations were inadmissible for any purpose at Mr. Lawson's trial. RCW § 9.73.050; State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

Mr. Lawson's attorney's performance was deficient because he did not move to suppress the conversations which were

recorded in violation of the Privacy Act. The prosecutor in her trial brief and argument notified the court and the defendant of the State's intent to introduce the recordings, and also mentioned that the defendant had not given the State notice of any motions to suppress. 1/24/06 RP 4-5. Mr. Lawson's trial counsel did not respond to the State's brief, did not enter any motions in limine, and did not request a CrR 3.6 hearing. The trial judge indicated his surprise:

| | |
|---|---|
| Court: | Let me ask, I did not receive a trial brief from you, Mr. Richards. Is there anything you wanted me to read? |
| Mr. Richards: | No, your Honor. |
| . . . | |
| Court: | It's noted there's no 3.6 motion. |
| Mr. Richards: | No, your Honor. |

Had Mr. Lawson's attorney moved to exclude the recordings, RCW § 9.73.050 would have required suppression.

Normally, the reviewing court gives deference to a court-appointed attorney's performance before finding it was deficient, as there are countless decisions that may appear unreasonable in hindsight but at the time were based upon a legitimate trial strategy or tactical reason. Strickland, 466 U.S. at 689. There can be no legitimate tactical explanation, however, for counsel's failure to bring a plausible motion to suppress evidence that was potentially

unlawfully obtained. State v. Reichenbach, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004) (no conceivable tactical reason to fail to move to suppress critical evidence where there were "serious questions" about validity of search warrant); State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006) (no tactical reason to fail to move to suppress evidence obtained as result of stop that might have been pretextual); State v. Kirkpatrick, 89 Wn. App. 407, 416, 948 P.2d 882 (1997) (counsel's performance deficient for not moving to suppress statements possibly elicited in violation of CrR 3.1(c)(2)), rev. denied, 135 Wn.2d 1012 (1998).

Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought. Meckelson, 133 Wn. App. at 436. Especially "in light of the breadth of the [privacy] act's purpose," Faford, 128 Wn.2d at 483-84, the trial judge likely would have suppressed the evidence here. Accordingly, Mr. Lawson's attorney's failure to move to suppress the recordings constitutes constitutionally deficient performance.

d. A 'no duty to retreat' instruction must be given whenever the jury can conclude retreat is a reasonable alternative to self-defense. Persons acting in self-defense have no duty to retreat

when assaulted in a place they have a right to be. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); State v. Williams, 81 Wn. App. 738, 742, 916 P.2d 445 (1996). The trial court must so instruct the jury where the jury could otherwise conclude that flight is a reasonably effective alternative to the use of force. Redmond, 150 Wn.2d at 495; Williams, 81 Wn. App. at 744. Failure to provide such instructions constitutes prejudicial error, requiring reversal and remand for a new trial. Redmond, 150 Wn.2d at 495.

e. Mr. Lawson's attorney's performance was deficient because he failed to request a 'no duty to retreat' instruction. Although Mr. Lawson's theory of the case was self-defense, his trial attorney failed to request a "no duty to retreat" instruction. 1/25/06 RP 113-38. As in Williams, the lack of the "no duty to retreat" instruction was exacerbated by the inclusion of the State's necessary force instruction:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 44 (emphasis added); Williams, 81 Wn. App. at 741. As in Williams, a reasonable juror here "could have erroneously

concluded that [the defendant] used more force than was necessary because [he] did not use the obvious and reasonably effective alternative of retreat." Id. at 744.

Mr. Lawson was further prejudiced by the omission when the prosecutor in her closing argument implied a duty to retreat:

> Maybe she's tried to jostle you before, and you've never been hurt, and you know that if she tries to jostle you today, you're not going to get hurt, and all you have to do is step out of the way to avoid what's going to happen, you do not get to hit her.

1/26/06 RP 14 (emphasis added); See Redmond, 150 Wn.2d at 495 n.3 (need for "no duty to retreat instruction" highlighted by prosecutor's suggestion in closing argument that "if anybody had the way to get out of the situation, it was the defendant").

Thus, if Mr. Lawson's attorney had requested the instruction, the trial court would have given it. The law in this area is "well settled." Redmond, 150 Wn.2d at 493. Where an attorney in these circumstances requests a "no duty to retreat" instruction, failure to give the instruction constitutes prejudicial error. Id. at 495. Counsel's failure to request the instruction therefore "fell below an objective standard of reasonableness under professional norms" and constitutes deficient performance. State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001).

f. Mr. Lawson was prejudiced by his counsel's deficient performance. A defendant suffers prejudice from his counsel's deficient performance if there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have been different. Reichenbach, 153 Wn.2d at 130. Here, it is reasonably possible that the jury would not have found Mr. Lawson guilty of second degree assault beyond a reasonable doubt if his attorney had moved to suppress the illegally recorded conversations and requested the "no duty to retreat" instruction.

As to the recordings, the prosecutor depended heavily on this evidence to prove both intent and absence of self-defense. In closing argument the prosecutor stated, "Not only do we have Ms. DeCaro's account of events for you, we have words from the defendant himself, the jail-recorded conversations . . . . And in those jail conversations the defendant evidences the fact that he did intend to assault her." 1/26/06 RP 8. The prosecutor proceeded to replay snippets of the conversations during closing argument. 1/26/06 RP 9. Then she repeated the words herself: "He says, 'I was out of line. I apologize. I can't be fucked on this. I know what I did. Please just tell them it was an accident.'" Id. She again played the recording and again repeated the words herself, tying them to

the argument that the defendant's conduct was intentional: "'I was out of line. Messed up. Upset.' Not, you know, 'I didn't mean to hit you.'" Id. "We have the defendant's words and we have D'Anna's testimony. It's nothing but intentional." Id.

Without the defendant's words there is a reasonable possibility that the jury would not have found the State proved the element of intent beyond a reasonable doubt. This alone suffices to show prejudice, as the State must prove each element of a crime charged beyond a reasonable doubt in order to convict a defendant. Winship, 397 U.S. at 364.

The State also relied on the recordings to disprove self-defense. In closing, the prosecutor said, "And, interestingly, you will recall, going back to all those jail phone conversations, not once did the defendant say 'D'Anna, I was just scared you were going to hurt me. I reacted because I had fear for my own safety.'" 1/26/06 RP 14. Thus, there is a reasonable possibility that but for the jail recordings, the jury would not have found the State disproved self-defense beyond a reasonable doubt. For this reason, too, counsel's deficient performance prejudiced Mr. Lawson.

Mr. Lawson was further prejudiced by his attorney's unreasonable failure to request a "no duty to retreat" jury

instruction. As noted above, both the court's "necessary force" instruction and the prosecutor's closing argument stated or strongly implied that Mr. Lawson had a duty to retreat after Ms. DeCaro hit him. CP 44; 1/26/06 RP 14; See State v. Williams, 81 Wn. App. at 741; State v. Redmond, 150 Wn.2d at 495 n.3. It is reasonably probable that the jury took this into account and based their finding that the State failed to disprove self-defense on an erroneous belief that Mr. Lawson had a duty to walk away. See Williams, 81 Wn. App. at 744. Accordingly, the failure to request the instruction was prejudicial.

Because the performance of Mr. Lawson's trial counsel was deficient and this deficiency prejudiced Mr. Lawson, his conviction should be reversed and his case remanded for a new trial.

3. MR. LAWSON'S OFFENDER SCORE WAS INACCURATELY CALCULATED.

a. Mr. Lawson may attack his offender score for the first time on appeal. Sentencing issues, including challenges to the offender score calculation, may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (citing State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994)). "A justification for the rule is that it tends to bring sentences

in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court." Ford, 137 Wn.2d at 478 (quoting State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)).

Objections to clerical errors, inclusion of washed-out convictions, and other mistakes evident on the face of the judgment and sentence cannot be waived. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004) (citing In re Goodwin, 146 Wn.2d 861, 875-76, 50 P.3d 618 (2002)). Nor does a defendant waive objection to the comparability of an out-of-state conviction unless he has "affirmatively acknowledged" the classification of the foreign crime. Ross, 152 Wn.2d at 230. "Acknowledgment does not encompass bare assertions by the state unsupported by the evidence." Ford, 137 Wn.2d at 483.

Here, Mr. Lawson's offender score includes one clerical error, two out-of-state crimes that the State failed to prove did not wash out, and one incomparable out-of-state crime whose comparability was not affirmatively acknowledged by the defendant. The incomparable crime was unsupported by any evidence but was included in Mr. Lawson's history based on bare assertions by the

State. Accordingly, Mr. Lawson may challenge each of these errors in his offender score, and his case should be remanded for rescoring and resentencing. Ford, 137 Wn.2d at 485-86.

b. A clerical error resulted in the addition of an extra point to Mr. Lawson's offender score. In its Presentence Statement to the court, the State attached a scoring form in which it alleged that Mr. Lawson had committed 21 nonviolent felonies for a total offender score of 21. Supp.CP 81. The attached criminal history included in the list of felonies a violation of work release for which Mr. Lawson served 30 days in jail. Supp.CP 82. The final Judgment and Sentence properly excluded this nonfelony offense from the list. CP 63. However, the score was never corrected. CP 58. The score should have been reduced from 21 to 20 when the erroneously included nonfelony offense was stricken.

c. The inclusion of a conviction that the State failed to prove did not wash out resulted in the addition of an extra point to Mr. Lawson's offender score. Mr. Lawson's offender score was further inflated by a prior conviction that the State failed to prove did not wash out. Prior Class C felony convictions "wash out" and may not be included in the offender score once five years have passed between the date of last release from confinement and the

commission of a subsequent crime. RCW § 9.94A.525(2). A judgment and sentence that includes a washed-out conviction in its history and offender score is facially invalid. Goodwin, 146 Wn.2d at 865-66.

Where an out-of-state conviction is included in a defendant's criminal history, it is the State's burden to prove, by a preponderance of the evidence, its classification as a Class A, B, or C felony. State v. McCorkle, 137 Wn.2d, 490, 495, 973 P.2d 461 (1999). It is especially important to hold the State to its burden where, as here, the classification is critical to the determination of whether the conviction washed out. Id. The State's burden is "mandatory," and the defendant is not required to object to unsupported argument regarding classification in order to put the State to its proof. Id. at 496.

Here, the State failed to prove that Mr. Lawson's 1975 Pennsylvania drug offense did not wash out. The State averred only that Mr. Lawson was convicted of VUCSA-delivery in Pennsylvania on July 11, 1975, and that the penalty was "1 to 2 years." Supp. CP 83. This means Mr. Lawson was released on July 11, 1977 at the latest. Supp. CP 83. He next committed a crime on August 1, 1983 (a misdemeanor). Supp. CP 84. Thus, if his 1975

conviction for delivery of a controlled substance constituted a Class C felony, it washed out and was improperly included in the offender score. See RCW § 9.94A.525(2) (Class C felonies wash out after five years); In re Williams, 111 Wn.2d 353, 361-62, 759 P.2d 436 (1988) (sentencing court may not include washed-out convictions in calculating offender score). It is impossible to tell from the State's report whether Mr. Lawson's Pennsylvania crime constituted a Class B felony or a Class C felony. See RCW § 69.50.401 (whether drug offense constitutes Class B felony or Class C felony depends on type of drug). As the State failed to prove that Mr. Lawson's 1975 offense was a Class B violation that did not wash out, his case must be remanded for resentencing. McCorkle, 137 Wn.2d at 497.

d. The inclusion of an incomparable out-of-state conviction resulted in the addition of an extra point to Mr. Lawson's offender score. "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW § 9.94A.525(3). The State bears the burden of proving the existence and comparability of a defendant's out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002). The State must prove the

conviction would be a felony under Washington law. Ford, 137 Wn.2d at 480.

Washington courts apply a two-part test to determine whether the State has satisfied this burden. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the court compares the elements of the out-of-state crime with the comparable Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the sentencing court counts the defendant's out-of-state conviction as an equivalent Washington conviction. Id. at 254.

But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying conduct, as evidenced by the undisputed facts in the record, violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. Even if the State presents additional evidence of conduct beyond the judgment and sentence, "the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial." Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

Here, the State failed to prove that Mr. Lawson's 1974 Pennsylvania conviction for receiving stolen property is comparable to a conviction in Washington for possession of stolen property. The State did not present any evidence at all, but merely included this offense in the list of felonies presented to the court as part of Mr. Lawson's criminal history. Supp.CP 83. The sum of the information presented consists of "receiving stolen property – 12/13/1974 – PA Marienville – Guilty – 1 to 5 years." Id. Defense counsel did not "affirmatively acknowledge" the comparability of this crime and therefore Mr. Lawson may challenge it on appeal. 2/22/06 RP 1-18; Ross, 152 Wn.2d at 230; Ford, 137 Wn.2d at 483.

In Pennsylvania the crime of Receiving Stolen Property is defined as follows:

> A person is guilty of theft if he intentionally receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner.

18 Pa.C.S. § 3925 (emphasis added). The definition was the same when Mr. Lawson was convicted. See Commonwealth v. Walters, 378 A.2d 993, 994 (Pa. 1977). Washington's definition for the relevant crime is narrower:

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW § 9A.56.140(1). Thus, Mr. Lawson may have engaged in conduct that would be a felony in Pennsylvania and no crime at all in Washington (receiving property that he believed was probably stolen but did not know was stolen).

Furthermore, conduct that constitutes a felony in Pennsylvania could be a (nonscoring) misdemeanor in Washington. In Pennsylvania, receipt of stolen property amounts to a felony if "the receiver is in the business of buying or selling stolen property." 18 Pa.C.S. § 3903(A.1). In Washington, such conduct would be a misdemeanor if the value of the property were less than $250. RCW § 9A.56.150; RCW § 9A.56.160; RCW § 9A.56.170. Thus, even if Mr. Lawson had the requisite mental state under Washington law, he may have committed a crime that would constitute only a misdemeanor, and a misdemeanor does not count toward an offender score. RCW § 9.94A.525.

Finally, even if the State had proved that Mr. Lawson committed a comparable felony, the State would have had to

further prove that it was not a Class C felony subject to washout, as discussed above. McCorkle, 137 Wn.2d at 495. See RCW § 9A.56.160 (Possessing Stolen Property in the Second Degree is a Class C felony). Because Mr. Lawson spent five crime-free years in the community between 1977 and 1983, a 1974 conviction on a Class C felony would have washed out. RCW § 9.94A.525(2).

The State failed to present any evidence that Mr. Lawson committed a crime at all under Washington law, let alone a felony rather than a misdemeanor or a Class B felony rather than a Class C felony. Accordingly, his Pennsylvania conviction for receiving stolen property should not have been included in his offender score.

e. Due Process requires that this case be remanded for recalculation of the offender score and resentencing.

"Determinations regarding the severity of criminal sanctions are not to be rendered in a cursory fashion." Ford, 137 Wn.2d at 484. "Absent a sufficient record, . . . it is impossible to determine whether the convictions are properly included in the offender score." Id. at 480-81. A "lack of any evidence supporting classification falls below even the minimum requirements of due process." Id. at 481. "[F]undamental principles of due process

prohibit a criminal defendant from being sentenced on the basis of information which is . . . unsupported in the record." Id.

> There is an important symbolic aspect to the requirement of due process. . . . Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions.

Id. at 484 (quoting American Bar Ass'n, Standards for Criminal Justice: Sentencing std. 18-5.17 at 206 (3d ed. 1994).

The absence of due process and miscalculation of the offender score in this case was not harmless. The sentencing court imposed the maximum possible sentence under the standard range based partly on the "very large number of prior felony convictions." 2/22/06 RP 13.

Thus, even if Mr. Lawson's conviction is affirmed, his case must be remanded for resentencing. Ford, 137 Wn.2d at 485-86. Because Mr. Lawson's attorney failed to object to specific defects, the State must be allowed to supplement the record regarding the classification of the VUCSA offense at an evidentiary hearing. Id. On remand, the State must prove by a preponderance of the

evidence that this crime did not wash out. Id. at 480; McCorkle, 137 Wn.2d at 497.

However, the State may not present evidence that the receiving stolen property conviction is comparable to a conviction for possessing stolen property in Washington, because "[w]here the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable." Lavery, 154 Wn.2d at 258; See State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004).

Finally, the point for Mr. Lawson's nonfelony violation of work release must be deducted from his offender score. Supp.CP 82.

F. CONCLUSION

Because the State failed to disprove self-defense, Mr. Lawson respectfully requests that this Court reverse his conviction and dismiss his case with prejudice. In the alternative, his conviction should be reversed and his case remanded for a new trial because he did not receive effective assistance of counsel. At a minimum, Mr. Lawson's case should be remanded for recalculation of his offender score and resentencing.

DATED this 15th day of November, 2006.

Respectfully submitted,

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